MOHD NUSI AHMAD & ORS

v.

BANK PEMBANGUNAN MALAYSIA BHD

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-22-2003-I]
21 OCTOBER 2004

CIVIL PROCEDURE: *Striking out - Grounds for - Whether plaintiffs' statement of claim disclosed reasonable cause of action - Whether embarrassing - Whether plaintiffs acted oppressively and abused process of court - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)*

CIVIL PROCEDURE: *Pleadings - Striking out - Principles applicable - Whether pleadings disclosed reasonable cause of action - Whether embarrassing - Whether plaintiffs acted oppressively and abused process of court - Rules of the High Court 1980, O. 18 r. 19(1)(a), (b), (d)*

This was an appeal by the plaintiffs against the decision of the learned deputy registrar allowing the defendant's application to strike out the plaintiffs' action under O. 18 r. 19(1)(a) or (b) or (b) of the Rules of the High Court 1980 on the grounds that the plaintiffs' pleadings did not disclose any cause of action against the defendant, and, that the plaintiffs' action was also an abuse of the court's process. One Dayang Tahir ('the deceased') had executed a 'third party' charge in favour of the defendant over a piece of land ('the said land') to secure banking facilities of RM148,000 granted by the defendant to a firm ('the borrower'). The deceased died intestate and the plaintiffs were appointed as administrators and administratrix of her estate. However, the letters of administration granted to the plaintiffs did not include the said land as an asset of the deceased's estate.

Upon default of repayment by the borrower, the defendant took steps to enforce its statutory remedy under the Land Code (Cap 81) (Sarawak) by applying to sell the said land. Accordingly, the defendant filed an originating summons against the plaintiffs in their capacity as co-administrators/co-administratrix of the deceased's estate. The High Court dismissed the originating summons on the ground that the plaintiffs were wrongly cited as defendants in it as the said land had not been included in the letters of administration of the deceased's estate. The defendant's subsequent appeal to the Court of Appeal

was also dismissed. The plaintiffs then, some one year and three months later, commenced an action against the defendant for having filed the originating summons against them. The defendant's application to have this action struck out was allowed by the deputy registrar. Hence, this appeal by the plaintiffs.

Held (dismissing the appeal):

[1] The plaintiffs had an obligation by the rules of pleading to state with clarity the material facts upon which their cause of action in negligence against the defendant may be sustained; they clearly had not done so in this instance. Likewise, there were no material facts pleaded in the statement of claim to disclose a cause of action against the defendant for malicious prosecution in commencing the charge action against the plaintiffs, or of the tort of abuse of process in commencing the same. It was insufficient for the plaintiffs to merely narrate the fact that the charge action was brought against them in their representative capacity and that it was dismissed as they were wrongly cited as defendants, because it was the mode of doing the act complained of *ie*, the wrongful bringing of the charge action, that gave the plaintiffs their cause of action that had not been pleaded by them. Thus, the plaintiffs' statement of claim was clearly embarrassing because what they had done, in effect, was to simply narrate a whole set of facts and throw it at the head of the defendant, with a claim to be paid special and general damages for it but leaving the defendant guessing what the plaintiffs' cause of action was and what case the defendant had to meet. (pp 116 h, 117 a-d, h & 118 a)

[2] In this case, it was the primary duty of the plaintiffs to have included the said land over which the charge was registered as an asset of the deceased's estate, which they did not do. Whatever their reason or excuse for not doing so, it did not sit well with justice that the plaintiffs should be permitted to maintain the present suit because by their omission to comply with an express provision of law and their continued omission to do so, the plaintiffs had not only managed to thwart the defendant's enforcement of its statutory remedy as chargee, but also rely on the effects of their own omission to mount an attack against the defendant by launching this action. It was clearly oppressive to do so and an abuse of the process in the circumstances disclosed in this case. (p 118 e-f)

Case(s) referred to:
Esso Petroleum Co Ltd v. Southport Corporation [1956] AC 218 ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 11
Rules of the High Court 1980, O. 18 rr. 7(1), 19(1)(a), (b), (c), (d)

Other source(s) referred to:
Sir Jack Jacob's Pleadings: Principles and Practice, 1990 edn, p 85

For the plaintiffs - Fabian Sigar; M/s John Shek, Sigar, Wei Yee & Co
For the defendant - Cila Nasu; M/s Dr Yaacob & Ismail

Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:
This is the hearing of an appeal to the judge in chambers from the decision of the learned deputy registrar who, on 4 November 2003, allowed the defendant's application to strike out the plaintiffs' action under O. 18 r. 19(1) (a) or (b) or (d) on the grounds that the plaintiffs' pleadings did not disclose any cause of action against the defendant, and, that the plaintiffs' action was also an abuse of the court's process. The plaintiffs being dissatisfied under the deputy registrar's decision, bring this appeal.

The facts leading up to this appeal may be briefly stated.

On 1 September 1981 one Haji (SIC) Dayang binti Tahir (hereafter 'Hjh. Dayang Tahir') executed a charge in favour of the defendant herein, over a piece of land owned by her and held under Kuching Lease No. 9446 (hereafter 'the said land') which charge was registered at the Kuching Land Registry as Instrument No. L841271981 (hereafter 'the charge')

The charge is what is popularly referred to as a 'third party' charge. It was executed to secure banking facilities of RM148,000 granted by the defendant to a firm called Syarikat Bujang Enterprise (hereafter 'the borrower').

On 12 May 1989 Hjh. Dayang Tahir died intestate and on 1 November 1989 the 7 plaintiffs were appointed as Administrators and Administratrix of her estate. However, the Letters of Administration which was granted to the plaintiffs did not include the said land as an asset of Hjh. Dayang Tahir's estate.

In 1994 the borrower defaulted in its obligations to the defendant. By 31 October 1994 there was a sum of RM315,623.24 owing to the defendant. The defendant then took steps to enforce its statutory remedy under the Sarawak Land Code by applying to sell the said land. Accordingly on 4 November 1994 the defendant filed an Originating Summons numbered KG. 238 of 1994 (I) against the 7 plaintiffs in their capacity as co-administrators/co-administratrix of the estate of Hjh. Dayang Tahir.

The defendant's originating summons came up for hearing on 24 July 1995 before the High Court when it was dismissed by the learned judge on the ground that the 7 plaintiffs were wrongly cited as defendants in the originating summons as the said land had not been included in the Letters of Administration of the Estate of Hjh. Dayang Tahir. The defendant being dissatisfied with the order made by the learned judge appealed, but its appeal was dismissed by the Court of Appeal on 11 June 2001.

Some one year and three months later, the plaintiffs commenced this action against the defendant for having filed the originating summons against them. The defendant then applied to have this action struck out, which the deputy registrar allowed. Hence this appeal.

On hearing the plaintiffs' appeal, I dismissed it with costs. I now give my reasons for doing so.

To begin with, reference must first be made to the plaintiffs' statement of claim. Paragraph 1 states, without more, that the plaintiffs are individuals residing at an address at Kuching, Sarawak. Paragraph 3 and 4 states that the plaintiffs were sued by the defendant in Originating Summons No. KG. 238 of 1994 in their capacity as co-administrator/administratrix of estate of Hjh. Dayang Tahir in respect of the charge executed by Hjh. Dayang Tahir over the said land. Paragraph 5 states that despite the plaintiffs orally informing the defendant that they had no knowledge of the "matter at hand" the defendant refused to note that the plaintiffs have no knowledge of the "said transaction". Paragraph 6 states that the plaintiffs were summoned before the High Court at Kuching on 24 July 1995, but that the defendant's application was dismissed as all the plaintiffs were wrongly cited as defendants in the originating summons proceedings, and the plaintiffs say they will rely on the judgment of the court at the trial of this action. Paragraph 7 states that being dissatisfied with the decision of the High Court, the defendant appealed that decision but their appeal was dismissed by the Court of Appeal on 11 June 2001. Paragraph 8 states that "'Further and alternatively" the "said actions by the defendant" were "calculated to cause loss of reputation, distress and

hardship and public ridicules (SIC) and embarrassment to the plaintiffs". Paragraph 9 and 10 states that by letter dated 21 November 2002 the plaintiffs, through their advocates, demanded from the defendant an apology and compensation including costs and legal fees and disbursements in respect of the matters mentioned in para. 8 of the statement of claim but the defendant have refused to do so. Paragraph 11 states that on 17 December 2002 the plaintiffs again demanded, through their advocates, an apology and compensation "for bringing in the plaintiffs in this action" but the defendant has refused to do so. Paragraph 12, which is the last paragraph of the statement of claim, states that "by reason of the matters aforesaid", the plaintiffs were gravely injured in their personal character and reputation and have been brought into public odium and embarrassment "not only amongst their relatives but within their Malay Community, business partners and friends" and were put to considerable trouble, inconvenience, anxiety, expenses and they have also suffered loss and damages. Paragraph 12 further states that "the said action executed by the defendant in its natural and ordinary and/or inferential meaning meant and were understood to mean that the plaintiffs were crooks and cheats and have the intention to commit offences of such nature".

For particulars of General Damages the plaintiffs stated two items: pain and suffering and loss of reputation. For particulars of Special Damages the plaintiffs stated that they had paid legal fees of RM5,000 in this action. By way of relief the plaintiffs claimed:

(a) Special Damages of RM5,000;

(b) General Damages;

(c) Interest at the rate of 8% per annum from date of judgment till full settlement; and

(d) Solicitor's and clients' cost or under s. 11 of the Civil Law Act 1956.

Having indicated what the matters pleaded in the plaintiffs' statement of claim are, this will be a convenient place to refer to some of the rules governing pleadings. In an adversarial system of civil proceedings, one of the main objects of pleadings is to inform each party what is the case of the opposite side which he will have to meet. Thus, in *Esso Petroleum Co. Ltd v. Southport Corporation* [1956] AC 218 at p. 266 Lord Normand said:

> The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them.

a It is largely to promote the achievement of this function of pleadings that O. 18 r. 7(1) Rules of the High Court 1980 ('the RHC') states that:

> 'Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be; but not the evidence by which these facts are to be proved ... .

b

For those who run foul of or ignore the basic rule of pleadings housed in O. 18 r. 7(1), the rules of court provides a sanction or remedy. This is found in O. 18 r. 19(a), (b), (c) and (d) which provides that the court may at any stage of the proceedings order to be struck out, *inter alia*, any pleading on the ground that it discloses no reasonable cause of action; or it is scandalous, frivolous or vexatious; or it may prejudice, embarrass or delay the fair trial of the action; or it is otherwise an abuse of the process of the court and order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

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One of the complaints against the plaintiffs' pleadings in this case is that it discloses no reasonable cause of action against the defendant here. Is there any substance to the defendant's complaint? To determine this question one must only look at what was pleaded in the plaintiffs' statement of claim. I have, at the beginning of this judgment, attempted to summarise, as best I could, what the plaintiffs pleaded.

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The defendant complains that from the plaintiffs' statement of claim, it (the defendant) does not know what case it has to meet because it does not know whether it is being sued for negligence or for malicious prosecution or for some other tort. Put in another way, the defendant finds the plaintiffs' pleadings embarrassing, in that, the defendant does not know what case it has to meet.

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It is for this reason that at the hearing of this appeal, I asked counsel for the plaintiffs what the plaintiffs' cause of action was? Counsel said it was for damages for the tort of negligence for being sued by the defendant in the charge action. When I asked counsel for the plaintiffs if a case in negligence had been pleaded against the defendant, he very candidly replied "No", but went on to say that the defendant had been negligent in bringing the charge action against the plaintiffs. If that is what the plaintiffs maintain then they have an obligation by the rules of pleading to state with clarity the material facts upon which their cause of action in negligence against the defendant may be sustained, but they have clearly not done so here. Likewise, there are no

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material facts pleaded in the statement of claim to disclose a cause of action against the defendant for malicious prosecution in commencing the charge action against the plaintiffs, or of the tort of abuse of process in commencing the same.

Now, since the RHC requires a chargee who wishes to enforce its statutory remedy of sale to do so by way of filing an originating summons and since the administrators of a deceased's estate are the proper parties to be named in an action against the estate, the defendant's act of commencing the charge action against the plaintiffs in their capacity as administrators was, in my view, not actionable in itself and so it was insufficient for the plaintiffs to merely narrate the fact that the charge action was brought against them in their representative capacity and that it was dismissed as they were wrongly cited as defendants, because it is the mode of doing the act complained of ie, the wrongful bringing of the charge action, that gives the plaintiffs their cause of action which has not been pleaded by the plaintiffs. In this regard useful reference may be made to *Sir Jack Jacob's Pleadings: Principles and Practice* (1990 Edition) where at p. 85 the learned author discuses what needs to be pleaded in certain actions in tort. This is what the learned author states:

When the mode of doing the act is the gist of the action:

> In some actions sounding in tort the act complained of is not actionable in itself, but is made so by the way in which it is done. Here it must be shown in the pleading that the act was committed in a certain manner – "negligently", "maliciously", "without reasonable or probable cause", or with knowledge of a certain fact; such matters constitute a necessary part of the statement of the wrongful act. Examples are claims for driving negligently, for malicious prosecution.

In addition to what is said above, the plaintiffs also appear to have rolled-up several complaints against the defendant in their statement of claim. Thus, the plaintiffs complain that the defendant's "said actions" were calculated to embarrass, publicly ridicule, and to cause them loss of reputation, distress and hardship as the "said action" "in its natural and ordinary/inferential meaning meant and were understood to mean that the plaintiffs were crooks and cheats" etc. These averments are usually made in a defamation action, not negligence suit. So I can well understand why the defendant complains that it does not know, after reading the plaintiffs' statement of claim, what case it has to meet. In this regard I find the plaintiffs' statement of claim clearly embarrassing because what they have done, in effect, is to simply narrate a whole set of facts and throw it at the head of the defendant, with a claim to be paid special and general damages for it but leaving the defendant guessing what the

plaintiffs' cause of action is and what case it (the defendant) has to meet. I am not for one moment suggesting that a plaintiff may not plead more than one cause of action in a suit, but if he does he must do so separately and distinctly.

Quite apart from the above complaint about the plaintiffs' statement of claim I also found that the plaintiffs had acted oppressively and abused the process of court in instituting this suit. I say so for the following reasons. In the first place, the defendant was pursuing its statutory remedy as chargee under the Sarawak Land Code when it brought the charge action against the estate of the late Hjh. Dayang Tahir. In the second place, the plaintiffs had not been sued in their personal capacity in the charge action – the action had clearly been brought against them in their representative capacity as administrators to the estate of Hjh. Dayang Tahir, whereas the plaintiffs now sue in their personal capacities. A perusal of the Originating Summons No. KG. 238 of 1994 by which the charge action was commenced (see exh. DB1 to defendant's O. 18 application in encl. 21) shows that no allegation whatsoever of a personal nature is made against the plaintiffs. In the third place, s. 5 of the Administration of Estates Ordinance Cap 80 Laws of Sarawak states that a grant of letters of administration shall not be issued until an affidavit and inventory of all the property assets and effects of the deceased, has been sworn by the applicant for such administration. So in this case it was the primary duty of the plaintiffs here to have included the said land over which the charge was registered as an asset of Hjh. Dayang Tahir's estate which they did not do. Whatever may have been their reason or excuse for not doing so, in my judgment, it does not sit well with justice that the plaintiffs should be permitted to maintain the present suit because by their omission to comply with an express provision of law and their continued omission to do so, the plaintiffs have not only managed to thwart the defendant's enforcement of its statutory remedy as chargee, but also rely on the effects of their own omission to mount an attack against the defendant by launching this action. It is clearly oppressive to do so and an abuse of the process in the circumstances disclosed in this case.

It was for all the above reasons that I dismissed the plaintiffs' appeal with costs.